

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ELIZABETH MOONEY AND JANET HAYS,

Petitioners,

and

ANN HURST,

Intervenor,

v.

CITY OF KENMORE AND WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents.

CASE NO. 12-3-0004

(Mooney)

**ORDER ON MOTIONS
TO SUPPLEMENT THE RECORD**

THIS Matter came before the Board on Petitioners' Motions to Supplement the Record seeking to introduce 84 documents or sets of documents as supplementation of the record compiled by the City of Kenmore and Washington State Department of Ecology in adoption and approval of the City's updated Shoreline Master Program.¹ The City and Ecology filed various responses and the Petitioners replied.

¹ Petitioners' Motion to Supplement the Record (August 9, 2012);
City of Kenmore's Motion to Supplement the Record [with Declaration of Lauri Anderson] (Aug. 20, 2012);
Respondents' Joint Response to Motions (August 29, 2012);
Petitioners' Motion to Supplement the Record: Petitioners' Index II (Aug. 31, 2012);
City of Kenmore's Response to Petitioners' Motion to Supplement: Petitioners' Index II (Sept 10, 2012);
Department of Ecology's Response to Petitioners' Motion to Supplement: Petitioners' Index II (Sep. 10, 2012);
Petitioners' Motion to Supplement the Record: Petitioners' Index I Revised 11-3-12 (Nov. 5, 2012);
Respondents' Response to Petitioners' and Intervenor's Motion to Supplement the Record – Petitioners' Index I Revised 11-3-12 (Nov. 16, 2012);
Petitioners' Reply to Respondents' Response to Motions to Supplement the Record (Nov. 27, 2012);

1 The submittals of the parties reflect a profound misunderstanding of the role and authority of
2 the Growth Management Hearings Board in review of a Shoreline Master Program adoption.
3 Apparently the telephonic prehearing conference did not clarify the nature of the Board's
4 proceedings. Petitioners might have been spared the time and expense of compiling their
5 many documents for supplementation.
6

7 The Board reviews government compliance with the GMA, SEPA or SMA on the basis of the
8 record the city, county, or state agency has compiled. RCW 36.70A.290(3) states: "The
9 Board shall base its decision on the record developed by the city, county, or state" The
10 Board does not conduct "de novo" hearings, examine witnesses, determine the authenticity
11 of documents, or otherwise engage in fact-finding. Rather, the challenged city, county, or
12 state government agency is required to submit an Index listing "all material used in taking
13 the action which is the subject of the petition for review, **including materials submitted in**
14 **public comment.**" WAC 242-03-510(1). Then the Board decides the case based on the
15 parties' briefs and legal arguments, referencing exhibits that are contained in the record of
16 the government's public process.
17
18

19 The Growth Management Act gives the Board jurisdiction to review adoption and approval of
20 Shoreline Master Programs to determine whether they are in compliance with the Shoreline
21 Management Act. RCW 36.70A.280(1)(a). The GMA requires the city or county to provide
22 public notice and opportunities for public input so that the local government has all the
23 information it needs to make wise choices in its planning. RCW 36.70A.035, .140, .130(2).
24 The SMA has similar requirements. RCW 90.58.130 requires that Ecology and local
25 governments, in order "to ensure that persons and entities having an interest in the . . .
26 master programs developed under this chapter are provided a full opportunity for
27 involvement in both their development and implementation, . . . shall not only invite but
28 actively encourage participation by all persons and private groups and entities showing an
29 interest in shoreline management programs." Participation is encouraged "to ensure that
30 their interests are fully considered by the department and local governments."
31
32

1 RCW 90.58.090(2) requires Ecology to provide notice of its review of a proposed master
2 program, provide a comment period, conduct a public hearing in the jurisdiction, request the
3 local government to respond in writing to the issues raised in public comment, and make the
4 Department's own response to the public comment available to interested parties. Under the
5 SMA, Ecology and the local government are bound to consider the issues raised and the
6 evidence presented by members of the public.² The public process is designed to *ensure*
7 *that the government record contains the documents and other evidence that should be*
8 *considered.*
9

10
11 In other words, persons concerned about planning decisions, including Shoreline Master
12 Program adoptions, have the responsibility to provide city and state officials with the
13 documentation and testimony they believe is relevant. Decision makers should not be sand-
14 bagged with new evidence after they have taken action, and the Board will not base a
15 finding of non-compliance on the decision makers' failure to consider evidence that wasn't
16 presented to them before the vote.
17

18
19 WAC 242-03-565 permits the filing of motions to allow for evidence that supplements what
20 is in the Index, providing: (Emphasis added)

21 **Generally, the board will review only documents and exhibits taken from**
22 **the record developed by the city, county, or state in taking the action that is**
23 **the subject of review by the board** and attached to the briefs of a party. A party
24 by motion may request that the board allow the record to be supplemented with
25 additional evidence.

26
27 ²RCW 90.58.100(1) provides, in relevant part:

28 In preparing the master programs, and any amendments thereto, the department and local
29 governments shall to the extent feasible: . . .

30 (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any
31 special expertise with respect to any environmental impact;

32 (c) Consider all plans, studies, surveys, inventories, and systems of classification made or being
made by federal, state, regional or local agencies, by private individuals, or by organizations dealing
with pertinent shorelines of the state; . . .

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics,
and other pertinent data; . . .

1
2 (1) A motion to supplement the record shall be filed by the deadline established
3 in the prehearing order, shall attach a copy of the document, and **shall state the**
4 **reasons why such evidence would be necessary or of substantial**
5 **assistance to the board** in reaching its decision, as specified in RCW
6 36.70A.290(4). The board may allow a later motion for supplementation on
7 rebuttal or for other good cause shown.

8 The requirement referenced in WAC 242-03-565 comes from RCW 36.70A.290(4), which
9 provides:

10 The board shall base its decision on the record developed by the city, county, or
11 the state and **supplemented with additional evidence if the board**
12 **determines that such additional evidence would be necessary or of**
13 **substantial assistance** to the board in reaching its decision. (emphasis added)

14 As with all motions to supplement, the burden is on the moving party to demonstrate the
15 evidence they wish to add is necessary or of substantial assistance to the Board. To satisfy
16 this burden, the moving party should explain what is in the evidence that makes it relevant,
17 how it is not available elsewhere in the record, and why consideration of the additional
18 evidence would be necessary or particularly helpful to the Board. Proposed additions to the
19 record, "[t]o the extent [they] were **submitted to the jurisdiction as a part of the**
20 **jurisdiction's proceedings prior to the challenged action . . .** are presumed admissible
21 subject to relevance." WAC 242-03-510(3). "Evidence arising subsequent to adoption of the
22 challenged legislation is rarely allowed" except when supported by a motion showing the
23 necessity of such evidence to the Board's decision concerning invalidity. WAC 242-03-
24 565(2).

25
26 In the present case, the Index filed July 3, 2012, indicates the City's process to update its
27 Shoreline Master Program began with Planning Commission meetings December 2007 and
28 culminated with City adoption of its SMP Update and transmittal to Ecology in February
29 2011 [E533]. After a public process, Ecology responded with required changes in October
30 2011 [E596]. The City, after additional public input, adopted Ordinance 12-0334, the SMP
31
32

1 update, on February 13, 2012. On March 26, 2012, Ecology issued its approval letter for the
2 Kenmore SMP [E854].

3
4 The City's Index contains 346 numbered records. Mss. Mooney, Hays, and/or Hurst are
5 named beginning in September 2009 as providing comments, letters, or background
6 materials.³ Petitioners had ample opportunity to put into the City's record any additional
7 material – photos, studies, records of past enforcement, or other matters – they believed
8 should have shaped the City's SMP.
9

10 Ecology's Index contains 463 items. Mss. Mooney, Hays, and/or Hurst are named beginning
11 in June 2010 as providing comments, sending emails, and forwarding documents.⁴
12 Petitioners had ample opportunity to put into Ecology's record any material they believed
13 should have shaped the agency's approval or modification of the City's SMP.
14

15
16 In their requested supplementation list and accompanying briefs, Mss. Mooney, Hays and
17 Hurst have identified the documents, charts, and photos they wish to add but have failed to
18 indicate why each item (or all of them) are "necessary or of substantial assistance" for the
19 Board's decision. The issues in the PFR challenge the SMP allowance for industrial use in a
20 part of Kirkland's harbor area that has been contaminated from almost a century of past
21 industrial practices. Most of the proposed supplemental materials document the history and
22 extent of contamination. But the supplementation motion does not indicate why the Board
23 needs duplicative evidence of the contamination of the area in order to determine whether
24 designating the area for industrial use violates the SMA.
25

26
27 In Legal Issues 2 and 3 the PFR states the Respondents "failed to incorporate new
28 information pertaining to contaminants, including high dioxin levels being detected during
29 activities occurring within the shoreline area." The Board presumes from the Index listings
30

31
32 ³ C 121, C 164, C 185, C 187, C191, C 206

⁴ E 514, E 700, E 701, E 712, E 734, E 737, E 738, E 739, E 746, E 748, E 828, E 832, E 833, E 837, E 838, E
842, E 843, E 844, E 845, E 846

1 and the Declaration of Lauri Anderson, City of Kirkland Senior Planner, that the “new
2 information” is the October 2011 Army Corps of Engineers report on Harbour Village Marina
3 dioxin contamination – Petitioners’ Index I.A.1, 2, and 3. Ms. Anderson states these
4 documents were not submitted to the City until the meeting at which the final SMP vote was
5 taken. The Board notes Ecology was promptly informed by Ms. Hays [E844] and apparently
6 reviewed the Army Corps report before issuing its SMP approval letter. Because there was
7 at least an attempt to put this information into the record – albeit too late – the Board admits
8 these documents and the Anderson Declaration as “necessary or of substantial assistance”
9 in deciding the Legal Issues in the PFR.
10

11
12 By contrast, Legal Issue 4 alleges the Respondents “failed to incorporate information related
13 to contaminants, such as dioxins,” posing particular danger to salmon, and the motions to
14 supplement offer a number of scientific studies providing such information [Petitioners’ Index
15 III.C, D, and E], but there is no indication Mss. Mooney, Hays, or Hurst put any of these
16 studies into the record or brought them to the attention of either Ecology or the City.
17

18 Accordingly, the Board makes the following rulings on the motions to supplement.
19

20 **Petitioners’ Index I**
21

| Item | Argument | Admitted/Denied |
|---|--|----------------------------------|
| A. Materials on Pollutants at Kenmore Shores: | | |
| 1. Harbor-Village-Marina-DY12-SDM.pdf: October 2011 Army Corps report of contaminants at Harbour Village Marina | This is apparently the “new information about dioxin contaminants” referenced in Legal Issues 2 and 3. Documents were submitted to City and Ecology. May be of assistance to the Board in deciding those issues. | Admitted as Supp. Ex. 1.a |
| 2. Summary of study: <i>Results for all Dioxins and Contaminants at Harbour Village Marina</i> | Same | Admitted as Supp. Ex. 1.b |

| | | |
|--|--|--|
| 3. Entire study (635 pages) submitted on CD | Same | Admitted, as Supp. Ex. 1.c , but parties will rely on the Report or Summary above |
| 4. <u>New</u> : WindWard study dated 2010 showing 13.2 pptr of Dioxins in Kenmore prior to 2006. | No information why this information was not timely provided to the City or Ecology to be made part of the record. | Denied |
| 5. <u>New</u> : Email chain by WindWard staff on Dioxin contamination and location of WindWard Dioxin testing station | Petitioners make no showing that this is necessary to the Board's decision. Source and direction of historic contamination is not necessary to a determination of whether industrial designation complies with the SMA. | Denied |
| 6. <u>New</u> : Map showing flow from cement batch plants and Dioxin level, station of 2005. | Presents unverifiable information that would require Intervenor's testimony. | Denied |
| 7. <u>New</u> : Packet of violations of air quality regulations from 1968 – fly ash and particulates noted in Puget Sound Air enforcement actions at cement batch plant. | Respondents object that these are site-specific enforcement actions by clean air agency under a separate regulatory scheme. Petitioners make no showing that historic source and direction of fly ash contamination is necessary to the Board's determination of issues in the case. | Denied |
| 8. <u>New</u> : <i>Study on Fly Ash and Dioxins</i> determines Dioxin content is dependent on fly ash source. | Petitioners do not explain how this is necessary to the Board's decision. | Denied |
| A. Navigation Charts: | | |
| 1. Army Corps Chart of Lake Washington levels by month for three years. | Petitioner states chart shows depth inadequate for large commercial traffic. No explanation of why this is necessary for the Board's decision. | Denied |

| | | |
|---|--|--------------------------------|
| 2. Army Corps chart of Kenmore Navigation Channel of February 2011 | Chart of navigation channel may be a useful illustrative exhibit. | Admitted as Supp. Ex. 2 |
| 3. Kenmore Air hydrosurvey1 . | Redundant – Petitioners say it confirms the Army Corps chart. | Denied |
| 4. Kenmore Air hydrosurvey2 | Redundant | Denied |
| 5. 10-17-11 Bathy chart used to dock commercial traffic in area since sloughed; this survey performed by Cal Portland. | No information about why this might be necessary for the Board's decision or, if so, why it wasn't presented to City or Ecology for inclusion in the record. | Denied |
| 6. Manson Navigation Chart, a.k.a. 'Kenmore Soundings' document – survey performed in September 2010 by KGM and used to navigate large commercial traffic according to John White, SR520 project manager. | The motions to supplement provide no information as to how this document, or the other navigational charts, might assist the Board in determining whether Kenmore's SMP complies with the SMA. | Denied |
| B. Photos of Sediment Dispersal from Kenmore Yard into Lake Washington and Kenmore Shores: | While most of the images are dated Google Earth photos, someone has added arrows and commentary. Personal testimony would be required to interpret the images. | Denied |
| 1. 5 2009 which shows nothing in river upstream of bridge-1 | Same | Denied |
| 2. 5 2009 red in ponds and trapped along island-2 | Same | Denied |
| 3. 5 2009 red appears in lake-3, carried by incoming Sammamish River Current. | Same | Denied |
| 4. 5 2010 red under marinas | Same | Denied |
| 5. 6 2010 red pond with arrows | Same | Denied |

| | | |
|--|------|--------|
| 6. 8 2011 less red under HV still under LP | Same | Denied |
| 7. 8 2011 red ponds filled in. | Same | Denied |

Petitioners' Index II

| Item | Argument | Admitted/Denied |
|---|---|--|
| II.A: History of Kenmore Yard | | |
| A.1: 1991 <i>Site Hazard Assessment, Kenmore Ind'l Park</i> | No indication of author, agency, or date. | Denied |
| A.2: February 19, 1992 Ecology letter noting site ranking for Kenmore Ind'l Park is "1" on <i>WARM</i> scale. | Ecology says the letter is from Ecology files, but handwritten notations and 4-5 pages of attachments are not. | Admit letter as Supp. Ex. 3 , but deny handwritten notations and all attachments. |
| a. January 1996 Draft Plan for SSDP for DDES. | Respondents object because document addresses plan for a proposed 1996 development and relates to prior regulations. | Denied |
| b. Additional Draft for Remedial Design October 10, 1996 | Lacks authentication – no author or source of document indicated | Denied |
| | As an alternative to the above drafts, Ecology offers Exhibit A. June 22, 2001, RI/FS for Kenmore Ind'l Park. Board notes the RI/FS provides background information about the property that appears to be the Petitioners' primary concern and might be of assistance to the Board in its decision. | Admitted as Supp. Ex. 4 |
| A.3: September 2, 1998 from King County DDES requiring no site alterations or construction until compliance with MTCA is achieved through a remediation plan. | Respondents object that King County's 1998 permit conditions are not relevant to SMP Update. | Denied |

| | | | |
|----|---|--|--------------------------------|
| 1 | A.4: Hazardous Sites List, Part I | Presumably these reports are in Ecology's files. But additional documentation that the area is contaminated and has been for many years is not necessary to the Board's decision. | Denied |
| 2 | | | |
| 3 | | | |
| 4 | | | |
| 5 | A.5: Hazardous Sites List, Part II | Same | Denied |
| 6 | | | |
| 7 | A.6: Sound Citizen Oversight & Permit Enforcement intent to file suit for infractions of Clean Water Act by tenant of Kenmore Yard and settlement of that suit. | Documents relate to appeal and settlement of a citizen suit under the Clean Water Act. Such settlements don't generally provide proof of facts and are not likely to assist the Board in its decision. | Denied |
| 8 | | | |
| 9 | | | |
| 10 | | | |
| 11 | A.7: Greg Wingard letter 1/27/10 explaining settlement. | Same. | Denied |
| 12 | | | |
| 13 | A.8: Greg Wingard letter 1/28/10 on Clean Water Act. | Same. | Denied |
| 14 | | | |
| 15 | A.9: Greg Wingard letter of 6/8/10 to Maura O'Brien site manager of Kenmore Yard for Ecology. | Same. | Denied |
| 16 | | | |
| 17 | | | |
| 18 | A.9.a: <u>New</u> : In response to ongoing suit above, July 2009 Letter from City Manager attaching Ecology requirements. | Same. | Denied |
| 19 | | | |
| 20 | | | |
| 21 | | | |
| 22 | A.10: ERTS #629705 DNR Report to Ecology October 2011 on Dioxin | Report of a spill in DNR leased marina. Petitioners do not explain how this is necessary to the Board's decision. | Denied |
| 23 | | | |
| 24 | | | |
| 25 | A.11: King County Department of Assessments showing toxic site | Redundant. See Supp. Ex. 4 above. | Denied |
| 26 | | | |
| 27 | A.12: Department of Ecology Results from 2009 Site Status Meeting, Letter from Maura O'Brien, Ecology, 2/27/2009 | Though not submitted in the SMP process, this document is presumably in Ecology's files and updates information in Supp. Ex. 4. | Admitted as Supp. Ex. 5 |
| 28 | | | |
| 29 | | | |
| 30 | | | |
| 31 | | | |
| 32 | | | |

| | | | |
|----|---|---|---------|
| 1 | a. <u>New</u> : Megan Darrow letter on site conditions in 2008. | Document was apparently retrieved after adoption of the SMP. Redundant. | Denied |
| 2 | | | |
| 3 | b. Photos of Kenmore Yard taken by Megan Darrow during 2008 visit. | Same | Denied |
| 4 | | | |
| 5 | | | |
| 6 | II.B: EPA and Ecology documentation of toxic waste in former landfill on Kenmore Ind'l Park site | | |
| 7 | | | |
| 8 | B.1. EPA documentation provided by FOIA | FOIA request to EPA post-dates Ecology's approval of Kenmore SMP, so this material is not the "new information" referenced in Legal Issues 2 and 3. | Denied |
| 9 | | | |
| 10 | a. EPA FOIA response cover letter March 21, 2012 | Same. | Denied |
| 11 | | | |
| 12 | b. EPA <i>Notification by Bayside Disposal of Hazardous Waste Site</i> | Same. Redundant – see Supp. Ex. 4, above | Denied |
| 13 | | | |
| 14 | c. Initial 1983 investigation called all Bayside Disposal Sites "high hazard sites" | Same. | Denied |
| 15 | | | |
| 16 | d. 1984 Ecology determination that industrial waste was not dumped at Kenmore site | Same. Original source of contaminants is not relevant to Board's determination of SMP compliance. | Denied |
| 17 | | | |
| 18 | e. EPA 1986 report copied Ecology 1984 findings. | Same. | Denied |
| 19 | | | |
| 20 | B.2: Ecology Publication 01-09-010 – Public Comment Notice re: Kenmore Ind'l Park Draft RI/FS. | Petitioners fail to state how this information is of substantial assistance to the Board. Duplicative of Supp. Ex.4 | Denied. |
| 21 | | | |
| 22 | B.3: Worksheet 1: Ecology publication explaining Kenmore Yard rating of "1" on Ecology's WARM scale. | Document missing from file. In any event, redundant in view of Supp. Ex. 4 | Denied |
| 23 | | | |
| 24 | | | |
| 25 | | | |
| 26 | | | |
| 27 | | | |
| 28 | | | |
| 29 | | | |
| 30 | | | |
| 31 | | | |
| 32 | | | |

| | | | |
|----|--------------------------------------|--------------------------------------|--------------------------|
| 1 | II.C: Disregard for toxins at | | |
| 2 | Kenmore shore within | | |
| 3 | SMP, consequences | | |
| 4 | C.1: <i>Scope of Sediment</i> | Post-dates SMP adoption. Board | Denied |
| 5 | <i>Sampling</i> includes | cannot find that it would be of | |
| 6 | November 30, 2012 letter | substantial assistance to the Board | |
| 7 | from Nancy Ousley of | in determining whether SMP | |
| 8 | Kenmore with questions on | complies with SMA. | |
| 9 | Army Corps requirements for | | |
| 10 | testing Kenmore Navigation | | |
| 11 | Channel. | | |
| 12 | C.2: Letter 2-14-2012 by | Same. | Denied |
| 13 | Laura Inouye of Ecology re: | | |
| 14 | WSDOT application. | | |
| 15 | C. 3: Chain of emails | Post-dates SMP adoption. | Withdrawn |
| 16 | 3/29/2012 and 8/30/2012. | Withdrawn in Petitioners' Reply | |
| 17 | | (Nov. 27, 2012), p. 8. | |
| 18 | C.4: David Radabaugh of | | Already in Index as |
| 19 | Ecology letter to Lauri | | E 691 |
| 20 | Anderson, Mark Johnson, | | |
| 21 | City Staff, Consultant on | | |
| 22 | April 26, 2012 <i>Channel</i> | | |
| 23 | <i>Migration Comments . . .</i> “ | | |
| 24 | C.5: Letter of February 23, | Post-dates City adoption of SMP. | Denied |
| 25 | 2012 from Assistant City | Doesn't appear to be “new | |
| 26 | Manager to Kenmore City | information” referred to in Legal | |
| 27 | Council that includes | Issues 2 and 3. | |
| 28 | Director of Regional Ecology | | |
| 29 | Jeannie Summerhays' letter | | |
| 30 | to legislators regarding | | |
| 31 | contamination. | | |
| 32 | II.D: Pictorial | While some of these images are | No more than four |
| | Chronological History by | dated Google Earth photos or | (4) pictures in the |
| | Google Earth History, | other images that are | D-1 to D-27 series |
| | Virtual Earth and Janet | authenticated, most require | may be offered as |
| | Hays -- photos of MTCA | additional personal testimony to | illustrative exhibits |
| | Site King County | understand. Petitioners provide no | of the “fragile |
| | precluded from | explanation why photos of the | shoreline |
| | development without clean | use/condition of the property from | environment” in the |
| | up: Kenmore Industrial | the 1990's to the present is | industrial area |
| | Park, a.k.a. Lakepointe, | necessary to the Board's | (Legal Issue 1), |
| | a.k.a. Kenmore Yard. In | determination of the legal issues in | provided each is |

| | | |
|---|------------|--|
| order, photos show pre I-5 debris, Storage, Renewal and Degradation. | this case. | authenticated and Petitioners make a showing that the information is necessary, etc. |
| D.1: Pre- I-5 debris – undated photo – <i>kcproperty_mapper</i> . | | |
| D.2: Early 1990 picture apparently photo-shopped. | | |
| D.3: 07/09/1990 Google picture, Kenmore Yard. | | |
| D.4: 05/2002 Google picture Kenmore Yard. | | |
| D.5: 07/09/1990 re-peat of D.2 | | |
| D.6: 07/26/2003 Google photo Kenmore Yard | | |
| D.7: 05/23/2005 Google photo Kenmore Yard | | |
| D.8: 07/31/2005 | | |
| D.9: 08/19/2005 | | |
| D.10: 07/09/2007 | | |
| D.11: 2008 Virtual Earth | | |
| D.12: Fall/Winter 2008 of Kenmore Yard by Janet Hays, photo 1 | | |
| D.13: Fall/Winter 2008 of Kenmore Yard by Janet Hays, photo 2 | | |
| D.14: 2009 Kenmore Yard by Janet Hays | | |
| D.15: 2009 Kenmore Yard by Janet Hays | | |
| D.16: 2010 Kenmore Yard by Janet Hays | | |
| D.17: 2010 by Janet Hays | | |
| D. 18: 06/25/2009 Google Earth, Kenmore Yard | | |
| D.19: 04/2009 Google Earth, Kenmore Yard | | |

| | | | |
|----|--|--|----------------------------|
| 1 | D.20: 05/14/2010 Google Earth, Kenmore Yard | | |
| 2 | D.21: 06/11/2010 Google Earth, Kenmore Yard | | |
| 3 | D.22: 08/19/2011 Close Up Google Earth, SW Corner, Kenmore Yard | | |
| 4 | D.23: 08/19/2011 Close Up Google Earth, NW Corner, Kenmore Yard | | |
| 5 | D.24: 08/18/2011 Google Earth, Kenmore Yard | | |
| 6 | D.25: Blank | | |
| 7 | D.26: 09/25/2011 Google Earth, Kenmore Yard | | |
| 8 | D.27: 09/25/2011 Green before WSDOT project, photo by Janet Hays | | |
| 9 | D.28: Present condition of Kenmore Yard, 3/21/2012 photo by Janet Hays | Photos post-date Ecology's final approval letter and could not have been part of the materials used in taking action on the SMP. | Denied |
| 10 | D.29: Present condition of Kenmore Yard, 3/21/2012 photo by Janet Hays | Same. | Denied |
| 11 | II.E. Evidence that City not following intent of shoreline master programs: | | |
| 12 | 1. <u>New</u> : City of Kenmore Shoreline Master Program up-date, Inventory of Data Sources, November 5, 2007. | | Already in record as E 401 |
| 13 | 2. <u>New</u> : November 22, 2011, City of Kenmore letter to Ecology re Alternative Proposals for SMP. | | Already in record as C 339 |
| 14 | 3. <u>New</u> : December 2011 Letter from City allowing grading permits for "Lakepointe Maintenance and Restoration Activities." | Document represents conditional approval related to a prior proposed project under former regulations. | Denied. |

| | | | |
|---------------------------------|---|---|--------|
| 1 2 3 4 5 6 7 | 4. <u>New</u> : June 25, 1979 agreement between Muckleshoots and Harbour Village Marina to enhance fishing. | This is the Muckleshoot Tribe's agreement with a private party on a marina project in 1979. Not presented to the City or Ecology for their record in adopting the SMP. No explanation from Petitioners how this might substantially assist the Board in its decision. | Denied |
|---------------------------------|---|---|--------|

Petitioners' Index III

| Item | Argument | Admitted/Denied |
|--|--|--------------------------------|
| 11 12 13 14 15 16 17 A. <u>New</u> : <i>Sediment Triad Analysis of Lakes Sammamish, Washington, and Union</i> , 2004, Kari Moshenberg. | Petitioners state the study shows PCB exceedance in the North Lake Washington site. Not presented to the City or Ecology for their record in adopting the SMP. Not a recent document, so presumably not part of the "new evidence" referenced in Legal Issue 2 and 3. | Denied |
| 18 19 20 21 B. <u>New</u> : 2008 303(d) List of sites in WRIA 8. Washington D.O.E. lists site 1077, North Lake Washington as having high PCB levels. | Department of Ecology report. | Admitted as Supp. Ex. 6 |
| 22 23 24 25 26 27 28 29 30 31 32 C. <u>New</u> : Meador, J.P., et al. 2010. Accumulation of PCBs in Outmigrating Juvenile Chinook Salmon. | Board may take official notice of scientific facts within the Board's specialized knowledge [WAC 242-03-0640(1)(c)] which encompasses efforts to protect anadromous fish. The studies offered as Index III C, D, and E were apparently not offered to the City or Ecology to be made part of their record in the Kenmore SMP proceedings. However, Ecology no doubt has these studies or similar ones in its agency files. Ecology should indicate by December 13 if it has any objection to the Board's | May be Offered |

| | | |
|--|---|--------|
| | official notice of these studies. The Board cautions Petitioners they have made no showing the studies are necessary or of substantial assistance to the Board in its decision. | |
| D. <u>New</u> : Meador, J.P., et al. 2002. Sediment-based Threshold Concentrations of PCB in Juvenile Salmon. | Same | Same |
| E. <u>New</u> : Steevens, J.A., et al. 2004. Fish exposure benchmarks for Dioxins. Peer reviewed paper developing toxic levels for fishes. | Same | Same |
| F. <u>New</u> : EPA Dioxin health hazard assessments beyond carcinogenic enabler: 2,3,7,8 – Tetrachlorodibenzo-p-dioxin (TCDD); CASRN 1746-01-6, issued 2/17/2012. | Study issued after City adoption of SMP. | Denied |

City's Motion to Supplement

| Item | Discussion | Admitted/Denied |
|---|--|--------------------------------|
| Declaration of Lauri Anderson, Senior Planner, City of Kenmore, August 17, 2012 | Necessary to show when the City was presented with new information about dioxin contamination levels, per Legal Issues 2 and 3, and Supp. Ex. 1. | Admitted as Supp. Ex. 7 |

DATED this 10th day of December, 2012.

Margaret Pageler, Presiding Officer